22

(3)

Supreme Court, U.S.
FILED
MAR 4 - 2009
OFFICE OF THE CLERK

No. 08-948

In The Supreme Court of the United States

HENRY JOSEPH ANDERSON
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

JELPI P. PICOU, JR.*
G. BEN COHEN
BIDISH J. SARMA
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
* *Counsel of Record for Petitioner*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The State's Opposition Brief Ignores the Central Question Raised – Whether *Apprendi* Applies to the Jury's Death-Determination.... 1

A. The State's Opposition Brief Fixates on the "Eligibility" Distinction and Fails to Recognize that the Consideration of Mitigating Circumstances is a Prerequisite to a Death Sentence..... 2

B. The State Conflates what is Permitted Under the Eighth Amendment with what is Required Under the Sixth and Fourteenth Amendments .. 4

C. Well-Founded Disagreement Pervades the Disparate Decisions Rendered by Courts Below.... 5

II. The State's Opposition Brief Does Not Refute the Petitioner's Argument that the Eighth Amendment Forbids Standard-less Procedures for Determining Death-Appropriateness 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*
Brice v. State, 815 A.2d 314 (Del. 2003) 5
Buchanan v. Angelone, 522 U.S. 269 (1998) 3-4
Johnson v. State, 59 P.3d 450 (Nev. 2002) 5
Kansas v. Marsh, 548 U.S. 163 (2006) 4, 5
Lowenfield v. Phelps, 484 U.S. 231 (1988) 6
McLaughlin v. Missouri, Cert. Pend. No. 08-822 .. 2, 6
Oken v. State, 835 A.2d 1105 (Md. 2003) 5
Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*
Roberts v. Louisiana, 428 U.S. 325 (1976) 3
United States v. Fields, 483 F.3d 313 (5th Cir. 2007) 5
Walton v. Arizona, 497 U.S. 639 (1990) 2
Woldt v. People, 64 P.3d 256 (Colo. 2003) 5

Statutes

La. C.Cr.P. art. 905.3 ..... 2, 4

BRIEF IN REPLY

This case squarely raises the question of whether *Apprendi* requires the jury's determination that death should be imposed to be made beyond a reasonable doubt. The State concedes that this question has perplexed and divided numerous courts below. But, rather than grapple with the legitimate difficulties posed by the question, the State's Opposition Brief merely asserts that Louisiana law comports with *Ring* and is therefore constitutional. However, the fact remains – under Louisiana's capital sentencing scheme, the determination that death should be imposed operates to increase the maximum possible punishment from life imprisonment to death. This Court should resolve the questions presented to provide clarity to the courts and ensure reliability and accuracy in capital proceedings.

I. The State's Opposition Brief Ignores the Central Question Raised – Whether *Apprendi* Applies to the Jury's Death-Determination

The State's Opposition Brief does not provide a rationale for its belief that *Apprendi*'s principles should not govern the jury's determination that death is the appropriate punishment. Instead, the Brief simply argues that "Louisiana's provision that the jury make the factual finding of an aggravating circumstances beyond a reasonable doubt was all that *Ring* required." Cert. Opp. at 15. Petitioner concedes that *Ring* did not answer the questions

presented here. *See* Cert. Pet. at 4 ("*Ring* explicitly left unanswered the question of *Apprendi*'s applicability to other capital sentencing determinations."). Petitioner submits, however, that "[t]his case presents an opportunity to address whether the Constitution requires the Louisiana statute's second determination (which encompasses consideration of any mitigating evidence) to be made beyond a reasonable doubt." *Id.* at 4-5.[1]

A. The State's Opposition Brief Fixates on the "Eligibility" Distinction and Fails to Recognize that the Consideration of Mitigating Circumstances is a Prerequisite to a Death Sentence

As the State acknowledges, "[a] Louisiana jury *must* consider all relevant mitigating circumstances . . . ." Cert. Opp. at 14 (emphasis added). The culpability determination – the decision that, "after consideration of mitigating circumstances . . . death should be imposed" – is a prerequisite to the imposition of a death sentence. La. C. Cr. P. art. 905.3. The State's suggestion that a death sentence

---

[1] It appears that "[i]f this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear . . . 'the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.'" *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting) (internal citations omitted); *see also* Brief on Behalf of Legal Academics in *McLaughlin v. Missouri*, No. 08-822.

is the statutorily available punishment once a defendant is found death-eligible fixates on the term "eligible" and is incorrect in states such as Louisiana where life without the possibility of parole is the maximum punishment absent a finding by the jury that, after any considering mitigating evidence, death is the appropriate punishment.

Indeed, aggravating circumstances are not enough to allow for a death sentence. A law that allows the jury to sentence a defendant to death without considering the mitigating circumstances is unconstitutional. *See Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) ("The constitutional vice of mandatory death sentence statutes – lack of focus on the circumstances of the particular offense and the character and propensities of the offender – is not resolved by Louisiana's limitation of first-degree murder to various categories of killings."). The severity of the crime, therefore, cannot by itself subject one to a death sentence. The sentencer must also decide, after consideration of any mitigating evidence, that the offender is culpable enough to receive a death sentence. A person convicted of first-degree murder can only receive a death sentence after the sentencer makes both the severity and the culpability determinations. Accordingly, *Apprendi*'s applicability should not turn on whether the finding at issue implicates the selection or eligibility phase. *See Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) ("an arbitrary line in the sand between the 'eligibility and selection phases' of the

sentencing decision is . . . ultimately doomed to failure.").

B. The State Conflates what is Permitted Under the Eighth Amendment with what is Required Under the Sixth and Fourteenth Amendments

Louisiana law provides that a death sentence shall not be imposed unless two predicate findings are made: first, the jury must unanimously determine beyond a reasonable doubt that a statutory aggravating circumstance exists, and second, after considering any mitigating circumstances, the jury must determine that a death sentence should be imposed. *See* La. C. Cr. P. art. 905.3. The State suggests the second determination requires no burden of proof so long as the first element is proven beyond a reasonable doubt. It then cites *Kansas v. Marsh* for the proposition that this Court has "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." 548 U.S. 163, 175 (2006) (internal citation omitted).

The State's misplaced reliance on *Marsh* demonstrates that it conflates what the Eighth Amendment permits with what the Sixth and Fourteenth Amendments require. *Marsh* – an Eighth Amendment case – reaffirmed that states enjoy wide latitude in determining the *manner* by which a capital jury decides to impose a death sentence. *See* Cert. Pet. at 26 (discussing weighing

and non-weighing schemes). *Marsh*, however, said nothing, about the *standard* by which a capital jury must make the culpability determination. Petitioner alleges that the Sixth and Fourteenth Amendments require the culpability determination be made beyond a reasonable doubt – no matter *how* the jury reaches that decision.[2]

C. Well-Founded Disagreement Pervades the Disparate Decisions Rendered by Courts Below

Courts below have disagreed over how to resolve the questions presented here. Some hold that the culpability determination is a factual determination, while others hold it is a weighing process distinct from traditional factual determinations. *Compare, e.g., Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) *with Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003). Some hold that the culpability determination elevates the maximum available punishment, while others hold that it does not. *Compare, e.g., Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc) *with Brice v. State*, 815 A.2d 314, 322 (Del. 2003). Finally, some courts characterize the culpability determination as a uniquely moral decision. *See United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007).

---

[2] In fact, the Kansas statute that this Court approved in *Marsh* "requires the State to bear the burden of proving to the jury, *beyond a reasonable doubt*, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate. . . ." 548 U.S. at 173 (emphasis added).

The well-founded disagreement that pervades decisions below is also captured by the petition for certiorari submitted in *McLaughlin v. Missouri*.[3] This deep and fundamental disagreement warrants this Court's attention.

II. The State's Opposition Brief Does Not Refute the Petitioner's Argument that the Eighth Amendment Forbids Standard-less Procedures for Determining Death-Appropriateness

Beyond its citation to *Marsh*, the State's Opposition Brief does not refute Petitioner's argument that the Eighth Amendment forbids Louisiana capital juries from imposing a death sentence without any standard to guide their decision. Though *Marsh* does partially protect a state's right to determine the manner in which aggravating and mitigating circumstances are considered, that right is constrained by the Eighth Amendment's mandate for heightened reliability and accuracy in capital proceedings. Louisiana's capital sentencing law fails to ensure that the death penalty is limited to the most culpable offenders for the worst of crimes.[4]

---

[3] No. 08-822. Petitioner Henry Anderson asks this Court to consider his petition along with Scott McLaughlin's petition.

[4] *See* Cert. Pet. at 30-31 n.18 (noting that since *Lowenfield v. Phelps*, 484 U.S. 231 (1988), "Louisiana has drastically expanded the statutory aggravating circumstances available to the prosecution, while reducing limitations on other evidence

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JELPI P. PICOU, JR.*
G. BEN COHEN
BIDISH J. SARMA
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

* *Counsel of Record for Petitioner*

---

that the jury may consider in making the death determination. . . . At the same time, the Court has increasingly constrained its review of underlying capital convictions. The expansion of the class of capital defendants, along with the Louisiana Supreme Court's reluctance to carefully review capital convictions, exacerbates the problem that juries are repeatedly instructed that there is no standard for determining who should live and who should die. By failing to ensure that only the 'worst of the worst' are sentenced to death, the Louisiana scheme raises grave Eighth Amendment and Fourteenth Amendment Due Process Clause concerns.").

The State inadvertently emphasizes these drastic changes in Louisiana law. Its Brief in Opposition actually cites to the most recent version of the Louisiana capital sentencing statute rather than the version in place when the crime was committed.